-- that's what it states?
A. Yes.
Q. And the date of that letter is what?
A. January 2004, 28th.
Q. Did my client come forward and make a full and complete disclosure as to where it was purchasing the Australian Gold and Swedish Beauty tanning lotions?
A. I don't believe so.
Q. So it, maybe, really was a request. In fact, ETS, Inc. did not sue my clients following this letter or at any other time until we filed our complaint first; is that correct?
A. Yes, you filed your suit against us.
Q. Is that because Ice -- I'm sorry. Is that because Australian Gold had no actual proof that my client was purchasing its products from distributors?
A. From my recollection, it was because we were in the middle of an appeal on the Hatfield case and we have limited resources and budgets and we had to pick our fights at that point in time.
MR. COLEMAN: Exhibit 10.

(The Court Reporter marked a document for identification as Exhibit No. 10.)
Q. Have you ever seen Exhibit 10 before?
A. Yes, I believe it was in the file. Yes, I believe so. It's in the files.
Q. In fact, Exhibit 10 is a letter from my office to Ice Miller dated January 29, 2004, in response to the previous exhibit. In the second paragraph towards the middle the letter says, "If your client believes it has some bona fide reason to think that our client is lying, we would like to know what it is; our client will readily rebut it without recourse to the courts." This was in response, I'll represent to you, to the assertion in the previous correspondence that our client was purchasing from -- directly from a distributor.
Did you have such proof at the time that you could have provided in response to the January 29, 2000 -- in response to exhibit -- Exhibit 10? Did you have proof at the time this letter was written that Australian -- that that my client was purchasing tanning lotion from -- from anyone

other than a tanning salon?
A. I don't think I can answer that, because I wasn't involved in this at that point in time.
Q. When did you get involved in this?
A. May or June of 2004 when we started making the switch.
Q. What's the switch?
A. ETS and Australian Gold as two separate entities.
Q. Uh-huh. Who would know whether or not Australian Gold had proof that would suggest that our client was purchasing merchandise directly from distributors since you have testified that you would not know?
A. I don't -- I don't know off the top of my head.
Q. But would it be one of the people who was copied on Exhibit 9? Would William Pipp know that?
MR. MATTHEWS: Objection to the form of the question.
MR. COLEMAN: What's the form objection?
MR. MATTHEWS: Calls for speculation.

How does she know what William Pipp --
MR. COLEMAN: Because she is the 30(b)(6) designee, she --
MR. MATTHEWS: I -- I don't see anywhere it says anything about communications between us. Has nothing to do with these -- these letters and -- and even your client in our efforts just -- with respect to your clients.
MR. COLEMAN: Okay.
MR. MATTHEWS: I mean, I'm not trying to be difficult, Ron, but that's --
MR. COLEMAN: No, that's -- that's a fair -- that's a fair point. We could set a -- we could certainly send interrogatories on -- on -- on the William Pipp mystery.
MR. MATTHEWS: Let -- let -- you know what? Let -- let me just -- let me do this. In proof -- and she may -- I don't want to testify for her, but if you're asking her why do they think your clients are buying from distributors, she can probably answer that question. When you say "proof," you're thinking do you have -- what did you have in your evidence file.

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MR. COLEMAN: Okay. Well, that's a fair point. Maybe we'll come around to it that way at some point.
Q. But what I am trying to figure out is at the time that we requested in January of 2004, what did you have proof, with a small p, why did you think -- can -- we can rephrase it.
Why did Australian Gold think that my client must have been purchasing from a source other than -- than tanning salons? Do you know the answer to that question?
A. Generally speaking, I couldn't go into a salon today that had every product that's listed on that Web site. So to buy it from a salon, they don't carry every single product generally, and every single product is listed on there, so he's buying it from more than just -- in our opinion was buying it more than just one person.
Q. Do you know how many salons carry Australian Gold products in the New York area?
A. I could get the list. I don't know off the top of my head.

Q. Would it be more than ten?
A. Yes.
Q. Would it be more than 50?
A. At that point I don't know. I don't know how many in New York City.
Q. But it was your opinion that -- perhaps it remains your opinion; you'll tell me -- that anyone who carried that wide range of products could not have gone from salon to salon buying boxes of tanning lotion?
A. We find it -- thought -- thought it unlikely.
Q. Why don't you -- do you know why Australian Gold or its attorneys never wrote back and said, "Mr. Coleman, here is why we think that. We think it's more product of a broader range of merchandise than could conceivably have been purchased from a single or even a number of tanning salons," do you know why no such letter was ever sent?
A. Here again, I wasn't involved. I can't answer that.
MR. COLEMAN: Exhibit 11.
(The Court Reporter marked a document for identification as Exhibit No. 11.)

Q. May we assume you have seen Exhibit 11 before?
A. Yes, you may.
Q. This letter is a letter from you, isn't it?
A. Yes.
Q. What was it that happened between early 2004 and the date of this letter February 22nd, 2005, that got Body Source back onto your radar?
A. There are several things. A few of them are -- of which are I became president of Australian Gold and part of that process we analyzed our business, we were looking at our strengths, weaknesses, opportunities and threats, and as part of that, the integrity of Australian Gold with regard to Internet came up and we decided to budget a portion of our revenues to relook at the whole Internet process -- the Internet sales process more aggressively.
Q. Was this letter -- was this letter vetted by counsel before it was sent?
MR. MATTHEWS: Objection. Invades the attorney-client privilege. I'll instruct her not to answer.

Q. The previous letters, Exhibits 9 and 6, refer to trademark infringement. Exhibit 11 does not refer to trademark infringement. Why is that?
A. I -- probably because we didn't have the attorneys -- I mean, we just were doing this on our own trying to work through the process.
Q. What does it mean that Australian Gold would -- starting the middle of the first sentence. I don't think I'm mischaracterizing it. "Will take whatever steps that are necessary to ensure that our products remain a premium product in the tanning industry." What do the -- what does the word "remain a premium product" mean?
A. To me, the -- the ultimate quality products that are sold in salons, that they aren't flea market quality products, they're the top of the line --
Q. Does --
A. -- from an integrity.
Q. Does the quality of the product

differ depending on where it's purchased?
A. It's the reputation. If you can buy a Rolls Royce at K-Mart, it's not the same as buying a Rolls Royce at the Rolls Royce dealer.
Q. Is it against the law to buy a Rolls Royce at K-Mart?
A. Not a law --
MR. MATTHEWS: Objection. For the record, it should be.
MR. COLEMAN: But then they can close for the rest of the day. I think you can buy one on eBay, by the way.
Q. You make reference there to the -- a $5.23 million judgment that Australian Gold obtained. Is that the Hatfield case?
A. Yes.
Q. The Hatfields actually were purchasing directly from distributors, weren't they?
A. I don't know everywhere they were buying from.
Q. I wasn't -- didn't ask you that. They did actually buy directly from distributors, didn't they?
A. Yes. But they also -- I know Tan

Company was contacted by them. That's a salon. So I don't know everywhere they purchased from.
Q. On the bottom of -- of the first page, it says, "If you choose to ignore this letter, Australian Gold, Inc. will take action against you and seek actual and punitive damages as well as a permanent injunction against you and enjoining you from selling our products on eBay or Internet Web sites." Do you have any reason to believe that my client was selling merchandise on eBay?
A. I believe it's a general statement.
Q. Fair enough. And where it says in the last paragraph in the last sentence, "Otherwise, we will look forward to discovering the scope of your business through depositions and discovery in the lawsuit that we will file against you." It does say that, right?
A. Yes.
Q. Was it your intention to file a lawsuit against Australian Gold, in short order, if your demands were not met?

MR. MATTHEWS: You might want to rephrase that. You said against Australian Gold. Unless she wants to sue herself.
Q. Was it your intention to -- to file a lawsuit against my clients, in short order, if the demands in this letter were not met?
A. We were prepared, yes.
Q. What were you -- did you actually intend to do it? I'm sure with this able legal team at your disposal, you're always prepared, but were you -- or had you made the decision at the time this letter went out that absent a satisfactory response there would be a lawsuit?
MR. MATTHEWS: I'm -- I'm going to object to the extent that her decision involved att -- attorney-client privileged communications. Instruct her not to answer with respect to the advice she received from us. If she can do that without doing --
MR. COLEMAN: Right.
MR. MATTHEWS: -- so, she can answer the question.
Q. You -- you being the executive -- who decides whether or not a lawsuit is filed by

Australian Gold?
A. Ultimately me.
Q. Have you made the decision whether or not a lawsuit would be -- and this is a yes or no question. It could be no. Had you made the decision whether or not there would be a lawsuit when this -- if these -- the demands in this letter were not met?
A. It's probable. I don't recall the date, but, yes, it's probable.
Q. Would you have written it if you didn't mean it?
A. It was probable. I mean, I can't recall that date specifically, but probably.
Q. Was it your practice to make -- is it your practice to bluff?
A. No, we've been in lawsuits before, but.
Q. So if you wrote it -- does it -- does that refresh your recollection that since you do not bluff and since you did write it that you must have meant it?
A. Did I -- I mean, the lawsuit is very entailed, so --
Q. So you don't remember?

A. I'm just saying -- you asked if on that date it was my intention to file a lawsuit and I'm saying it's probable, but I don't know that I sat down with a lawyer and said I'm going to file a lawsuit today.
Q. Well, you signed it on that day, right?
A. Right.
Q. So can we assume that everything that appears above your signature is sincere?
A. You can assume so.
MR. COLEMAN: Exhibit 12.
(The Court Reporter marked a document for identification as Exhibit No. 12.)
Q. Did you have a chance to look at it? Do you know what Exhibit 12 is?
(Witness peruses document.)
A. Yes.
Q. In fact, this is Australian Gold's amended answer, defenses in this litigation. Did you review this before it was filed?
A. Yes.
Q. Let's go to page 5. I'll just note for the record that this is -- the style of -- of the way this pleading was prepared was

that both the allegation and the answer to the allegation is printed conveniently on each page of the answer. So it says regarding Allegation 15, which was from our complaint, "All the Tanning Products sold by plaintiff at the supplenet.com Web site are purchased by the plaintiff at retail tanning lotion" -- "retail tanning salons." And just because we haven't mentioned it before at this deposition, this Supplenet.com is the name of the Web site where our client does business, that's correct, right, as far as you understand it, Supplenet.com?
A. One of them, yes.
Q. So the answer is "Australian Gold denies that plaintiff purchases its products from a retail tanning salon based upon plaintiff's volume of business, but is without sufficient information or knowledge as to the remaining allegations contained in paragraph 15 of the Complaint and therefore denies the same."
Now, I understand that this is lawyer talk, but do you have any understanding having looked this over before it was filed,

first of all, what the re -- what the remaining allegations are referred to in the second half of that answer?
A. I don't believe I asked for a definition, no.
Q. Okay. So that makes you and me both. Let's go to Australian Gold denies. Is it -- this seems to be consistent with your earlier testimony that the volume of business was the basis for Australian Gold's belief that plaintiff purchased its products from a retail tanning salon. Would you say that's correct?
A. Volume --
Q. Oh, this refers --
A. Assortment, yes.
Q. Yes. Also this refer -- that's what I find a little bit interesting because in your testimony you told me that what struck you was the assortment that that -- that they carried the full line, and this seems to go to the -- to the volume of business done. Are they both correct as to what your understanding was before we got into discovery in this case?

Was it both the volume and the variety or -- or is it one -- is either your -- your recollection maybe not quite -- does this in anyway refresh your -- your understanding of -- of what it was that made you confident enough to deny this allegation in paragraph 15?
A. Can you read it one more time?
Q. No. I'll just rephrase it. It's a stinky question.
Was it the volume of sales or was it the variety of Australian Gold products available on the Supplenet.com Web site that made you believe that my clients could not have been purchasing their product from tanning salons?
A. The vari -- I mean, the -- the variety, the number of products is part of the volume of the products. It's a huge amount. I mean, that's -- that is --
Q. Okay. So --
A. -- distributor catalog.
Q. So you didn't really know how much product was really being sold?
A. Right.

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Q. So it couldn't have been the volume in terms of warehouses full; in fact, you didn't know whether any actual sales at all were taking place on -- on the Supplenet.com, did you?
A. No.
Q. Were there other that's -- were there investigations that were being done -- I'm not -- I'm not interested in anything that was being done under the auspices of Ice Miller, but -- but outside of the sphere of the legal team, was your company investigating trying to find out whether or not there were -- whom -- whom my clients were buying from?
A. Yes.
Q. Do you remember what that investigation entailed?
A. We contacted distributors and looked for sales in different zip codes. We may have asked directly. I don't know each individual thing. We may have asked directly if they were selling to them.
Q. In fact, didn't you send out a memorandum or a letter to the distributors

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targeting this area --
A. Uh-huh.
Q. -- specifically asking them whether or not they had sold to the SuppleNet or -- or Body Source?
A. Yes.
MR. COLEMAN: Exhibit 12.
MR. MATTHEWS: 13.
MR. COLEMAN: I'm sorry.
(The Court Reporter marked a document for identification as Exhibit No. 13.)
Q. Have you seen Exhibit 12 before?
A. Yes.
THE COURT REPORTER: 13.
MR. COLEMAN: I'm sorry. 13 it is.
THE WITNESS: 13.
Q. Did you get cooperation from the distributors that received this letter?
A. I believe so, yes.
Q. This is AG0008380 through 83. Haven't been consistent throughout the deposition with that.
Did any of the responses indicate in March 2004 that any of your distributors had, in fact, been selling to Body Source?

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A. I don't recall. Again, I wasn't personally involved in this.
Q. Okay. Back to Exhibit 12.
MR. COLEMAN: We'll -- I think we'll break in five minutes as planned.
MR. MATTHEWS: We can.
MR. COLEMAN: Actually, why don't we break now?
(A lunch break was taken at this time.)
MR. COLEMAN: Okay. Back on.
Q. Okay. Now, just to kind of finish off where we were. Even though -- I'll represent to you that there are no fewer than three times in the answer where Australian Gold denies a claim by -- by my client that Australian -- that -- that my client purchases all his products from tanning salons, isn't it true that as of right now your -- Australian Gold does not know the suppliers -- it does not know the source from -- for SuppleNet's products?
A. Yes, we've not been told their sources.
Q. You've never been told. What -- if

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you found out what those sources were, what would happen? What would you do?
MR. MATTHEWS: Objection. It calls for speculation.
Q. You can answer.
MR. MATTHEWS: Depends on who it is. I'm sorry. I don't mean to testify, Ron.
Q. Assuming it's not the Hatfields or the McCoys.
A. Generally, if a situation would come up, we would make them aware of our contract and agreements and make sure that they're aware that now they are selling to someone that's reselling, because maybe they don't know. Maybe they're being -- I mean, there's a lot of people that lie out there, so we don't what's being told when they're buying their products.
Q. Would you tell the tanning salon that if they continue to sell to Internet reseller that you would instruct the distributor to stop selling to the reseller -- or stop -- stop selling to the salon?
A. We could.
Q. Have you every done that?

A. It's an option.
Q. Have you ever done that?
A. I don't believe there's been a situation where we told a distributor to stop selling to a salon, no.
Q. Now I'd like you to please take a look at paragraph -- page 17 of Exhibit 12 and look at paragraph 10. It says, "Upon information and belief, S&L Vitamins, and/or its owners, own, operate, control, manage or represent at least one retail tanning salon." Do you have any proof that this allegation is true?
A. Is true? I don't know.
Q. What was it that made -- made Australian Gold believe this -- when this pleading was filed?
MR. MATTHEWS: I'm just going to object for the record. This is a pleading drafted by counsel, not signed by the deponent or Australian Gold, and upon information and belief is a proper way to allege. Also -- and moreover, the fact that I'm under a protective order and can't disclose these -- the names of these alleged

tanning salons really prohibits my client from commenting on this, but you can answer.
Q. Nah, don't answer it. He's -- he's taken so much of the stuffing out of an answer you can give me, it's going to be worthless. I -- I know the answer anyway. I don't know. Okay, let's move on.
MR. COLEMAN: Off the record for a second.
(A discussion was held off the record at this time.)
MR. COLEMAN: Let's go back on, please. Exhibit 14.
(The Court Reporter marked a document for identification as Exhibit No. 14.)
Q. Have you ever seen the Web site -- I'm going to represent to you that Exhibit 14 is a screen -- screen shot from a Web site called vendatan.com, one word, vendatan.com. Have you ever seen vendatan.com?
A. No, I've never been to it.
Q. Would you -- would you authorize the sale of Australian Gold products through a vending machine? Would Australian Gold

authorize such a method of distribution -- or sale, rather, to the end user?
A. -- going to a salon.
Q. Is your answer that that if it were in a salon that it -- it might consider authorizing such a method of sale?
A. Yes.
Q. Have you ever heard of something called a do-not-sell list?
A. Yes.
Q. What's the do-not-sell list?
A. It's a list of mainly distributors, Internet -- unauthorized Internet or unauthorized distributors in general who either had a conflict of interest or the -- not uphold the spirit of our agreement.
Q. I'm sorry. They either -- what was the first thing or the two things?
A. They're either distributors who aren't authorized to distribute our products or Internet flea markets, beauty shops -- or, yeah, beauty supply stores that don't have tanning in general is what it is.
Q. Who gets the do-not-sell list?
A. Our distributor network.

Q. Does it go outside the distributor network, to your knowledge?
A. Not really.
Q. Do you ever share do-not-sell information with the -- the identities of firms identified as do-not-sell companies with your competitors?
A. Absolutely not.
Q. Do you consider Web sites like the SuppleNet to be competitors with your distributors -- or competitors of your distributors?
A. Of our distributors, no.
Q. Why is that? Don't they sell the same product?
A. But they don't offer the same services, so salons wouldn't necessarily buy for that. They'd lose too many benefits.
Q. Those benefits would be again what?
A. Co-op advertising benefits, SPIFFs, different programs we offer, training programs, our premier partnership programs.
Q. Do you have -- have any reason to believe that plaintiff in this case has ever concealed its identity from any person that

it bought products from?
A. I don't know who they bought products from, so I couldn't answer that.
Q. Do you have any reason to believe that the plaintiff in this case has ever claimed to own a tanning salon?
A. Not that I'm aware of.
Q. Do you believe that as a result of the activities of the plaintiff in this case, including the ones that are alleged in the counterclaims -- you know what a counterclaim is, right?
A. Yes.
Q. -- that the revenue of Australian Gold has been reduced from what it otherwise would have been?
THE WITNESS: Can you read that back?
(The Court Reporter read back the last preceding question, as set forth herein above.)
A. I specifically know there are customers of ours that we have -- either had to give special discounts or different rebates or things to because of sales on the Internet. I don't know specifically that

they bought from your client or --
Q. Why would customers be entitled to -- to discounts or other consideration?
A. Why would we do that?
Q. Yeah.
A. Because of our integrity, our reputation. We told them that we would protect this marketing channel for them and provide the professional steps throughout the marketing channel, and when they're embarrassed and, you know, don't know how to deal with customers that come in that purchased a lotion on the Internet for $10 less than what they were selling it for, we have to help them how we have to.
Q. When you say "customers," do you mean tanning salons?
A. Tanning salons, yes.
Q. So is that because Internet sales -- or rather Australian Gold merchandise sold on the in -- on the Internet costs less than that distri -- that sold by the distributors?
A. Pardon me?
Q. Is that because the -- the merchandise -- the Australian Gold

merchandise sold on the Internet costs less than the price from the distributors?
A. Not from the distributors, no.
Q. The distributors are able to match the prices charged by -- by Internet sellers?
A. Distributors don't sell to end consumers.
Q. I'm sorry. I mean, to the tanning -- to the clients that -- I mean, to the customers, to -- to your cus -- to the tanning salons. We should probably never use the word "customers."
MR. MATTHEWS: I'm confused on the question. Just --
Q. All right. Is it the case that you've had to make special consideration for certain tanning salons because your distributors could not match the prices available from Internet sellers?
A. No. The distributors are not involved in that.
Q. Then -- then -- I'm sorry. I must not be following why you had to give special discounts. The people -- people are coming into the tanning salons and complaining about

the pricing, correct?
A. Or complaining -- yes.
Q. They're saying why should I buy -- for example, why should I pay $66 for this? I can get it on eBay for $18 plus 5.95 shipping. Is that the sort of conversation that your tanning salons are reporting to you?
A. Yes.
Q. So does that mean that -- so -- so have you responded to that by selling directly to tanning salons?
A. No.
Q. Have you responded to that by directing your distributors to give a better price to these complaining tanning salons?
A. We work with each individual situation separately.
Q. How -- what -- what are examples of the individual kind of work that you do with these individuals?
A. We have had to do special co-op programs with them, special partnering programs with them, promotions, spend a lot of our time talking to them and trying to

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make them understand that we're doing the best we can and there's not another line out there doing what we do.
Q. When did the Internet problem, the sale -- the unauthorized sale of -- of Australian Gold products on the Internet come to Australian Gold's attention as a phenomenon, as an -- as an issue?
A. I would just be guessing backwards, but probably around 2000, 2001 it came to a head, I would guess.
Q. Has the Internet problem -- let's just call it that -- to your knowledge, as a whole resulted in -- has the Internet problem caused Australian Gold to lose sales?
A. Yes.
Q. You believe that by consumers -- is it your belief that because consumers can purchase Australian Gold merchandise for less on the Internet than they can buy from a tanning salon that fewer units are being sold?
A. I believe that we have lost customer salons or did not get business from salons because of them seeing our products on the

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Internet.
Q. So that would qualify as perha -- would -- would that qualify as a loss suffered by the salons?
A. Suffered by us. They can pick up another line or Australian Gold itself.
Q. Why are these salons no longer customers of your distributors, though?
A. They may be. The distributors carry a variety of products.
Q. Okay. But -- okay. You say you lo -- when you say you lost salons, what does that mean? They're no longer selling AG products?
A. There are some that aren't, yes, and there are some that aren't selling all the line.
Q. And is -- and is that because they can't compete with the Internet pricing?
MR. MATTHEWS: Objection to the form. You can answer, if you can.
A. They can compete -- I assume they can compete because I don't care what they sell a product for, but they -- the reputation, their integrity, having to deal with I found

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this out there, you're not doing anything about it is horrible for them. I mean, these people are businessmen and women.
Q. Are people bringing them counterfeit merchandise? Is that why they're complaining?
A. There have been instances where we received counterfeit product, yes.
Q. Can you give us the name of a -- of a salon that ceased to be a customer because of a counterfeiting issue or a damage --
A. Counter -- not counter -- not counterfeiting.
Q. Not counterfeiting. So are you really saying that -- when you say "integrity" -- that tanning salons are not interested in -- in buying a product that can be bought -- that they can't sell at a price that's competitive with the Internet price?
A. They can sell at a price that's competitive with the Internet price. I don't --
Q. They can?
A. But -- yes, but it affects -- I mean,

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their overhead is a lot more than somebody that's selling it over the Internet, so.
Q. In other words, they -- they could -- as a loss leader perhaps, they could still sell it, because they -- they're still able to get it cheaply enough from distributors that would be -- that they could match the Internet price, but they're not interested in doing that?
A. Some would be. Sometimes it's after the fact.
Q. Without your necessarily knowing how much Australian Gold merchandise is sold by Supplenet.com, doesn't it strike you as -- at least possible that because customers are able to buy the product for less that you might actually be selling more of the product?
A. Does it strike -- it's possible, yes, but it's not the business model we choose to distribute our products, so we're willing to lose that.
Q. That's understood. You're willing to lose that additional -- those additional sales in order to maintain the integrity of

your business model?
A. Yes.
Q. Can you -- can you quantify in any way the financial value of this -- this integrity?
A. What do you mean?
Q. Well, this -- you -- you've made a claim for damages in your counterclaims, and if you were to prevail on those claims, then, at some point, you would have to demonstrate -- I'm sure Mr. Matthews and his colleagues have explained -- some quantum of lost sales perhaps as a measure of damages. So I'm trying to understand -- with the under -- with the understanding on my part that you are not an economics or loss profits expert, but as the executive -- as the chief executive officer of this company, do you under -- do you know how you will be able -- how you will go about demonstrating the quantity of damages resulting from this loss of integrity or this harm in the integrity factor?
A. Well, first, we would find any immediate issues. There's the situation like

I just spoke with of a salon just recently who we had to create the new programs -- or not new programs, but we had to work with to get him to keep our lotion. I mean, the immediate out of his mouth was he was going to drop us --
Q. How long ago was that?
A. -- and he's a large --
Q. I'm sorry.
A. Within the last month.
Q. And what's the name of that salon?
MR. MATTHEWS: Again, under attorneys' eyes only.
MR. COLEMAN: Yes.
A. Malibu.
Q. Malibu salon located in?
A. Northern Indiana and southern Michigan.
Q. They have more than one --
A. Yes.
Q. -- location?
Does the fact that they have more than one location give them some leverage in approaching you for consideration?
A. One salon is -- I mean, we deal with

everyone the same if they have issues.
Q. Okay. So you were telling me what -- how you would go about demonstrating these losses. The first thing is you would identify consideration you have to make to tanning salons. Can I ask you is there anything preventing Malibu salon from buying product on eBay less expensively perhaps than it can get it from a distributor and matching prices that way?
A. We don't have a contract prohibiting anybody purchasing.
Q. Nonetheless, your company just re -- your company would -- would rather work with a Malibu salon and retain it as a customer than tell it go buy it on eBay. After all, you're trying to dissuade people from buying --
A. We work through the distributors and do the training and the programs through the distributors. The distributors track and work with their co-op advertising, so that wouldn't be --
Q. Do you know whether any actual person -- whether -- whether any person using the

Internet has ever been confused about whether any of the Web sites operated by my client are affiliated or authorized -- affiliated with or authorized by Australian Gold?
MR. MATTHEWS: I want to ob -- object right here, and I don't want to stop the deposition. In fairness, the 30(b)(6) topics which you discussed at the beginning of the deposition related to business dealings with distributors or retailers, training practices, the safety of products, financial losses and marketing, it didn't include issues such as likelihood of confusion.
MR. COLEMAN: Sure they do. That's a financial loss.
MR. MATTHEWS: No. Financial loss isn't talking about likelihood of confusion. The issue of likelihood of confusion has nothing to do with their --
MR. COLEMAN: I'm not asking her about likelihood of confusion. I'm asking her about actual confusion which would be a financial loss.
MR. MATTHEWS: That's not the question. Yes, it made me confused.

Q. Are you aware of any reports of --
MR. COLEMAN: Scott, your -- you point is well taken. We can --
MR. MATTHEWS: I just don't want -- I -- I know you can do it. I don't want to -- I just want to have that objection there, because we've prepared her on the topics we thought and -- and we've discussed that and she prepared, but to the extent we have due diligence that we -- if you're asking I want all instances of confusion, which I assume is your next question, I don't want us to be bound by that.
MR. COLEMAN: Well, again, I think we're going to have to insist --
THE COURT REPORTER: I can't hear you.
MR. COLEMAN: Why? Because I'm talking to the floor?
THE COURT REPORTER: Yes.
MR. COLEMAN: And I thought you were a pro.
MR. MATTHEWS: I'm not telling her not to answer.
MR. COLEMAN: No. But -- but if your

objection -- I think we do have to get to the bottom of your objection, because if -- if -- if I end up having to live with it, then I'm -- then I'm going to have a problem of you being able to distance yourself from the answer.
Financial losses suffered by Australian Gold as a result of plaintiff's action. I'm going to take the -- the position that actual confusion may have -- may have the effect of -- of an actual financial loss.
Q. Are you aware of any actual confusion that was experienced by an Internet user who came upon one of my client's Web sites and thought this must be the Australian Gold official Web site?
A. Well, I don't know of anyone that's went to your Web site, so.
Q. Do you have any reason to believe any consumers would have a preference as to whether they bought it from an authorized -- bought the same merchandise from an authorized retailer as opposed to buying it from my client or on eBay?

A. I know personally I do. I don't -- I mean, I would assume people do.
Q. What are -- okay. Well, actually you've answered that.
Are you aware of the Indoor Tanning Association?
A. Yes.
Q. What is the Indoor Tanning Association?
A. It is the trade association for indoor tanning.
Q. And is Bill Pipp on the board of directors --
A. Yes.
Q. -- of the Indoor Tanning Association?
That's a yes, correct?
A. Yes.
Q. Is it the only trade association for the tanning industry?
A. There are other associations.
Q. What are -- what are they?
A. I don't know. I mean, several of them want to start their own, but there's been several attempts.
Q. Is ITA the

A. ITA's the one --
Q. The one --
A. -- all the major manufacturers belong to, yes.
Q. Does the ITA do anything in terms of public education in terms of risks or dangers associated with tingle products?
A. Not that I'm aware of.
Q. How about other -- other aspects of consumer safety? Is the ITA involved in that at all?
A. I believe on their Web site they have a responsibility or tanning responsibility or something to that effect.
Q. Does the -- does Australian Gold contribute dues to the ITA?
A. Yes.
Q. Are dues the same for every member or industry leaders like Australian Gold, do they -- do they pay a larger percentage of its operating budget?
A. That's a good question. I --
Q. Fair enough.
A. -- sign the check. I don't know --
Q. It's good to be in an association.

A. -- how it's determined.
Q. Okay. Is it fair to say that the -- the view of Australian Gold, is that the expertise in tanning safety, is that person who is the tanning salon interface, in -- in other words, the person at the tanning salon who serves the customer?
A. It's the responsibility of that person, yes.
Q. Does Australian Gold ever consult with any medical experts in -- in connection with issues like tingle products or other safety issues?
A. What do you mean by "medical experts"?
Q. Physicians.
A. Prior to coming out with a product or -- I mean, what --
Q. On an ongoing basis.
A. No, not generally.
Q. Not generally?
Has any governmental unit ever taken an action against Australian Gold because of any kind of risk or danger perceived or -- or real in -- with respect to its product?

A. We had the FDA issue --
Q. FDA --
A. -- that we discussed earlier.
Q. Right. And they -- your testimony was that they review labeling?
A. Labeling and ingredients.
Q. If a consumer walks into a tanning salon and requests a bottle of Australian Gold tanning lotion, is there any way for Australian Gold to make sure that the employee at the tanning salon actually gives him any instruction?
A. I mean, it's our goal to -- from a liability standpoint to protect our -- ourself to train the employees to provide the best education and information on the products to the salon customer. There are salons out there, may hire somebody new, may not have -- you know, it's always possible that something can happen, but we do the best that we can do.
Q. So you really have no way of knowing what they ultimately will do, do you?
A. Not every single salon individual.
Q. The majority of them, do you know

what they do?
A. The major chains we go to -- I mean, there's a lot of salons we go to regularly. There's -- locally we're more likely to go to them than -- there's 20 -- over 25,000 salons, so we don't get to every single salon --
Q. Do you get --
A. -- every six weeks.
Q. I'm sorry. Did -- how -- how many do you get to in the course of a year?
A. I don't know. I have to figure that out. I don't know.
Q. But when you visit these salons, would you have any way of knowing how they interact with customers when you're not there?
A. No, we don't monitor them. We don't have them on video.
Q. Tanning salons, there --
MR. COLEMAN: Withdrawn.
Q. Do you know if any foreign government has any -- taken any regulatory or legal action against Australian Gold as a result of the products that are sold abroad?

A. We have had issues in Holland, yes.
Q. What kind of issues?
A. There was a quality issue with a water -- type of water that was used or something.
Q. In the -- in the product?
A. Eight or nine years ago.
Q. Did -- did -- did it have to do with labeling?
A. We have labeling requirements for Europe, yes.
Q. Are they different from the requi -- for the -- from the US requirements?
A. Yes.
Q. How are they different?
A. I would have to -- I don't know exactly, but we work with our distributors over there. We only have two distributors so that we have control over making sure everything is correct. They have to have import agents and different things.
Q. Is there -- speaking of those labels, are they -- are they protected by copyright registration?
A. Yes, we do have copyrights.

Q. Who -- well, are the -- are the registrations -- is there actually a -- when you put out a new label, whether it's a graphic or a text, is there somebody in your office or do you send it over to Ice Miller who makes sure that the registration -- that this cop -- that the -- this new material is actually registered for copyright protection?
A. We do some through our intellectual property attorneys and then we do some ourselves. Just depends.
Q. Have you always -- has this always been the practice at Australian Gold?
A. We may have lapsed at times, but it's been a general practice.
Q. Are the photographs used by Australian Gold in its various promotional products, are they protected by copyright registrations?
MR. MATTHEWS: I'm just going to object to the extent the answer calls for a legal conclusion.
You can answer.
Q. Yeah. I mean, I don't see how it possibly could. It's a yes or no question.

You have a piece of paper that says registered copyright or not.
A. The -- I mean, like on our catalog it's registered copyright, but every photo, I don't know if we've done that.
Q. Do you know what it costs to take one of those pictures, one picture of one product, for example? Do you have --
A. I'd have to pull the budget. I don't know.
MR. COLEMAN: Off the record, please.
(At this time a discussion was held off the record.)
(The Court Reporter marked a document for identification as Exhibit No. 15.)
Q. Let's go on to Exhibit 15 and we'll just ask a few questions about the responses to interrogatories, just a few.
On page 3 -- well, the question that began on page 2 is, "Identify all communications between you and any person not your attorneys about the plaintiffs and all the stuff that the plaintiffs do?" So I'm paraphrasing. It says here, "Australian Gold also had a telephone conversation with

Designer Skin about the Web site" -- meaning my client's Web site -- "and whether Designer Skin was taking legal action against S&L Vitamins." Who from Australian Gold had that conversation?
A. Well, it wasn't a phone conversation. I think we cleared that up, right?
Q. Have we?
MR. MATTHEWS: I cleared that up to David --
MR. COLEMAN: Oh, you cleared that up --
MR. MATTHEWS: -- in a supplemental request.
MR. COLEMAN: -- in a supplemental request, okay.
THE WITNESS: Yeah, yeah.
MR. MATTHEWS: So she will clarify on the record actually what occurred.
Q. So why don't you tell us what occurred so that we can be all clear about it.
A. We were in Germany October 28, 29, the end of October, and, you know, there was only a few of us that spoke English.

Because I -- I talked to Brad Grossman twice in my whole life, once there and once five years ago, so --
Q. And Brad Grossman is Designer Skin?
A. Yes, Designer Skin. And we were just talking, and as part of the conversation, we were bragging about everything we're doing with the Internet and we asked if he was doing anything. He couldn't recall, and we asked specifically about this case and he couldn't recall, and that was about the extent of it. It wasn't a lot of detail or anything.
Yeah, it was -- he talked about his products and that was about it.
Q. There is -- okay. Then let's go to -- to Interrogatory No. 3, which begins on page 3. Permit me -- if you find that the context is just absolutely necessary, then we'll go back and we'll belabor the record, but at the top of page 4 where you are listing the sources that support or show likelihood of confusion -- now again, Mr. Matthews has said likelihood of confusion is a legal term, so we -- we're not asking

about likelihood of confusion here.
We're asking what kinds of stuff happened and after all, you signed these interrogatories, so these are all facts that you have personal knowledge of. It says at the end that there were complaints lodged by the general public to Australian Gold concerning the sale of the products by Internet retailers. What kind of complaints were those?
A. I think you handed one of them where the salon was complaining and asked -- he asked right there is it authorized, not knowing are they legitimate to sell the products or not.
Q. That was a salon, correct?
A. Yes.
Q. Were there complaints by the gen -- I'm assuming, perhaps I'm reading this incorrectly, that by the general public we're talking about not the salons which are part of the tanning community, if you will, but cust -- but end users. Are you aware of complaints by end users to Australian Gold regarding Internet sales?

A. We have some situations, like I spoke, where people have gotten products that were half filled or had Vasoline Intensive Care in them or things like that. So, I mean, I don't have the details in front of me, but we have had issues.
Q. It says on -- in the answer to Interrogatory No. 4 and a few other places too, "Australian Gold" -- I'm going down to the fourth line from the top. "Australian Gold has spent in excess of $1.5 million on maintaining its distribution system and training its employees, distributors and tanning salons on the proper use of its products." Did that number come from you?
A. Yes, from my team.
Q. Now, is $1.5 million over the course of more than one year?
A. In the last three or four years probably. I -- I would have to get the exact numbers, but we spend money on -- I mean, we have two people there. All they do is go out and train. We have a staff of eight different sales representatives that go out to salons and to distributors and work

with them to improve their info -- knowledge on the products. We have -- you know, every time I have to get involved, that's a dime or two, you know, so it -- it adds up very quickly and --
MR. COLEMAN: I'm going to ask your lawyer to supplement his discovery. We can do this in writing, but to break out that number -- I wouldn't want to ask you on -- on one foot to tell me where that number came from because you don't have the numbers in front of you.
But it's one and a half million dollars real money to you and me, but I would like to see -- we -- we need more information and I think we're entitled to it as to when -- when the starting period is for that one and a half million and what -- what is being included in there. And we'll follow-up with a written.
MR. MATTHEWS: I'd just ask you follow-up in writing.
MR. COLEMAN: Yeah.
MR. MATTHEWS: Ask what you want; we'll pass it on.

Q. Okay. Now, in paragraph 5 -- I'm sorry. On page 5, Interrogatory No. 7, the first sentence -- the question is, "Set forth in detail the damage to defendant's, 'distribution system,' allegedly caused by plaintiff's conduct as described in paragraph 7 of defendant's counterclaim."
Answer, "The plaintiffs have undermined Australian Gold's distribution system by illegally obtaining the products from one or more authorized distributors through means which Australian Gold is still investigating."
In fact, isn't it true that as of this date you still have no proof whatsoever that has ever taken place?
MR. MATTHEWS: And I will object to the form of the question in light of the fact that she is only entitled to limited information and knowledge as to the suppliers and the source which your clients are getting them. Subject to that, she can answer that.
MR. COLEMAN: Well --
MR. MATTHEWS: Because -- because the lawyers may have proof at trial on that.

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MR. COLEMAN: That's right.
MR. MATTHEWS: Okay.
MR. COLEMAN: I mean, you know --
MR. MATTHEWS: I don't want this to appear in a -- in a summary judgement brief that Australian Gold has no proof, and we have proof and --
MR. COLEMAN: Well, she's certified to the proof of this statement which was not made upon information and belief. So I assume she didn't make it unless she believed it to be true.
Q. But now I'm asking to her whether in light of what she's come to understand about the facts of ground now, notwithstanding the -- the -- the limitations of the protective order, you -- are you aware of any distributor who is one of your authorized distributors from whom my clients directly purchased Australian Gold products?
A. I don't know who your clients are purchasing Australian Gold products --
Q. You --
A. -- so I can't --
Q. You don't know -- did you know when

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you wrote this who they were buying the products from?
A. We have some -- some thoughts of some people that could or could not be. We -- we believe that there's something going on. We don't know the details of yet.
Q. But here it says the -- that the plaintiffs illegally obtained the products. Is it fair to say that you were overstating what you really knew when you wrote that answer?
MR. MATTHEWS: Objection to the form of the question. You can answer.
A. I mean, all I can say is what I've said before. We believe that it's coming from one of our distributors because of the amount of products and volume that's on the -- on the Web site, and we're still looking to find out who it is.
Q. Have you done some sort of time study analysis that led you to believe that, say, one man in a large vehicle driving around metropolitan New York could not possibly -- even if he filled his days up with buying lo -- tanning lotion at salons -- could not

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possibly have purchased the -- the breadth of tanning lotion being sold on -- on the Web site?
A. I've not done a time study on New York city.
Q. It's just kind of a gut -- gut sense that you have?
A. Yes.
Q. Has Australian Gold ever learned of a tanning salon that was simply not maintaining basic safety or tanning responsibility practices?
A. I'm not aware of that, no.
Q. Are there files or is there some sort of centralized place where Australian Gold maintains a record of its monitoring of safety practices by tanning salons?
A. We don't have a safety practice, no. We -- we do it to protect their li -- from a liability standpoint, we go in and work with the salons. It's not a requirement of the FDA or anything else.
Q. Rather it's done for liability purposes?
A. Liability, yeah, make the best for

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the customers.
MR. COLEMAN: No further questions.

CROSS-EXAMINATION,
QUESTIONS BY MR. MATTHEWS:
Q. I have a couple very short questions that I want to cla -- clarify for the record.
I believe you were asked in direct examination about contracts with retail salons that Australian Gold has in place and I believe Mr. Coleman asked you a question were there any contracts between Australian Gold and retail tanning salons which prohibited the manner in which or to whom the tanning salons sold products or something to that effect.
And just so the record is clear, are there any such contracts between Australian Gold and -- and retail tanning salons?
A. We have the -- the contracts we spoke about. We also have the premier salon agreement that says they will sell products in their salons and to their tanners -- or in their salons.

Q. Okay. Is it your understanding from your salon --
MR. MATTHEWS: Well, strike that.
Q. What is your understanding of the premier salon agreement and -- and what restrictions, if any, it imposes upon retail tanning salons?
A. Well, it says that it's for sale in their salon, the products are for sale in the salon.
Q. Are retail tanning salons who are under a premier salon agreement permitted to resell the products to persons who sell on the Internet?
A. No, it doesn't say that they're permitted to. It says the sell it in their salon.
Q. Okay. So the answer is they're not permitted to sell to those who sell on the Internet?
A. Right.
MR. MATTHEWS: I have nothing further.
MR. COLEMAN: No redirect.
THE WITNESS: Thanks.

THE COURT REPORTER: Mr. Matthews, would you like a copy of the transcript?
MR. MATTHEWS: Absolutely.
THE COURT REPORTER: In what -- in what format? Do you want it --
MR. MATTHEWS: Condensed --
THE COURT REPORTER: Okay.
MR. MATTHEWS: -- and --
MR. COLEMAN: Evaporated.
MR. MATTHEWS: -- evaporated --
THE COURT REPORTER: Okay.
MR. MATTHEWS: -- and in a can.
THE COURT REPORTER: Copy of the exhibits?
MR. MATTHEWS: Why don't you give me an extra copy of the copied exhibits?

FURTHER THE DEPONENT SAITH NOT.

STATE OF INDIANA
SS:
COUNTY OF MARION

I, Deanne S. Hutson, a Notary Public in and for said county and state, do hereby certify that the deponent herein was by me first duly sworn to tell the truth, the whole truth and nothing but the truth in the aforementioned matter;

That the foregoing deposition was taken on behalf of the Plaintiff and Third Party Defendant, that said deposition was taken at the time and place heretofore mentioned;

That said deposition was taken down in stenograph notes and afterwards reduced to typewriting under my direction; and that the typewritten transcript is a true and accurate record of the testimony given by said deponent;

And that the deposition upon oral examination was taken down in Stenograph notes and afterwards reduced to typewriting under my direction and thereafter presented to said witness for signature;

I do further certify that I am a disinterested person in this cause of action; that I am not a relative or attorney of any of the parties, or otherwise interested in the event of this cause of action, and am not in the employ of the attorneys for any of the parties.

IN WITNESS WHEREFORE, I have hereunto set my hand and affixed my notarial seal this 20th day of March, 2006.

____

Deanne S. Hutson, Notary Public,
Residing in Marion County, Indiana
My Commission Expires:
November 6, 2006

STATE OF INDIANA

SS:

COUNTY OF MARION

I, Deanne S. Hutson, a Notary Public in and for said county and state, do hereby certify that the deponent herein was by me first duly sworn to tell the truth, the whole truth and nothing but the truth in the aforementioned matter;

That the foregoing deposition was taken on behalf of the Plaintiff and Third Party Defendant, that said deposition was taken at the time and place heretofore mentioned;

That said deposition was taken down in stenograph notes and afterwards reduced to typewriting under my direction; and that the typewritten transcript is a true and accurate record of the testimony given by said deponent;

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Deanne S. Hutson, Notary Public,
Residing in Marion County, Indiana
My Commission Expires:
November 6, 2006

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